How "Trial Lawyer" Became an Oxymoron

A Lament for the Disappearance of Civil Jury Trials

By Wood R. Foster Jr.

Representative government and trial by jury are the heart and lungs of liberty.
—John Adams, 1774

I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.
—Thomas Jefferson, 1789

Looking back over my 45 years of practice mostly representing plaintiffs in the civil litigation arena, it's hard not to notice that there are increasingly few role models for the would-be trial lawyer. If we are honest, we have to admit that most of the traditional role models for trial lawyers have either been fictional, such as Atticus Finch and Perry Mason, or are no longer practicing, such as Abraham Lincoln, Clarence Darrow, Thurgood Marshall, and Ralph Nader. And even among those icons, most are remembered for criminal defense work and not civil litigation.

In an area as large as the Twin Cities where I used to practice, most lawyers (especially if they are not trial lawyers) are hard-pressed to name a currently active lawyer noted for his or her jury skills, let alone one whose career is etched in the public imagination. I imagine the same is true in Michigan.

There's a reason for this: real civil jury trials are disappearing. "Trial lawyer" doesn't mean what it used to. I suspect that every lawyer who thinks of himself or herself as a trial lawyer knows what I'm talking about.

Contemplating this, I soon discovered that the dearth of civil jury trials has been a steady topic in legal academia for a long time. During my research,

I stumbled across a 1974 piece by U.S. District Judge Edward J. Devitt, the title of which reflected the judge's own view: "Federal Civil Jury Trials Should be Abolished." Use of juries, he opined,

> …is an unnecessary, time consuming, and costly appendage to our system of justice and does not well serve either the litigants or the public. Judges in the federal system are at least as well qualified as juries of lay people—probably better qualified—to decide issues of fact and law fairly.[1]

Devitt noted that the persistent backlog of cases "is caused largely by the number of civil jury trials required by the Seventh Amendment." "Certainly," he contended, "we cannot continue just to add more judges and build bigger courthouses."[2] And although most published opinions on this topic seem to relegate Judge Devitt to a minority, time and experience have proved Devitt's views prescient if not particularly popular.

The brink of extinction

The sad fact is that the civil jury trial is almost gone. The phenomenon is national and has reached the point that the civil jury trial may soon be a memory. The numbers are startling because the existing data suggests that on average *fewer than two percent of all federal cases go to trial, with less than one percent tried before a jury.*[3] A 2015 article in my local newspaper reported a $9.1 million medical malpractice jury verdict, making the startling comment that this record-setting verdict *was the only one of the 50 largest Minnesota malpractice awards that resulted from a jury trial.*[4]

Michigan's experience appears typical of virtually all states. I spent some time with Michigan's detailed 2017 Court Caseload Report, which supports the paucity of civil jury trials in circuit court. In the categories of "general civil," "automobile negligence," and "other civil damage" cases, a total of 40,635 reached circuit court disposition during 2017. Of those, a grand total of 258 cases (0.6 percent) were tried to a jury verdict. An additional 164 cases (0.4 percent) were resolved by a bench trial.[5] These figures are dismayingly low but represent comparable statistics in other states that I have reviewed.

The demise of jury trials is not a particularly recent phenomenon. In 1996, a law review article posed the long-term trend away from juries as a good thing from both practical and economic standpoints. The authors explained the trend in terms of a cultural/practical paradox: "Our culture portrays trial—especially trial by jury—as the quintessential dramatic instrument of justice. Our judicial system operates on a different premise: Trial is a disease, not generally fatal, but serious enough to be avoided at any reasonable cost." The huge disparity in numbers as between lawyers and judges, they explained, necessarily limits the costly resources used to conduct jury trials, such as courtrooms, time, jurors, and experts. "We prefer settlements and have designed a legal system that embodies and expresses that preference in everything from the rules of procedure and evidence, to appellate opinions, to legal scholarship, to the daily work of trial judges."[6]

We should look at this phenomenon in terms of its effect on *all* lawyers at a time when the profession is experiencing changes at so many levels. One heritage lawyers have always shared is the tradition of trials, the methodology and procedure of trials and evidence, and the customs and language of the courtroom. We have created a collective image that sets us apart even if many of us are rarely or never immersed in lawsuits. When nonlawyers think about lawyers, their image is almost certainly someone arguing in a courtroom. After all, Abraham Lincoln—who, like Clarence Darrow, never attended law school—is reputed to have tried more than 1,000 jury cases in his career as a lawyer.[7] Don't we all want to ride those coattails to some extent?

No one has captured this phenomenon more colorfully than Iowa U.S. District Judge Mark W. Bennett:

> The American trial lawyer (ATL), who, in innumerable ways enhanced the lives of so many Americans and made the United States a fairer, healthier, safer, more egalitarian and just nation, passed away recently. Although a precise age is uncertain, ATL is believed to have been at least 371 years old at the time of death….
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> The autopsy determined that ATL most likely died from a long term, progressive illness exacerbated by a slow, debilitating virus…commonly known as *Celotex-Anderson-Matsushita* syndrome. The death certificate also lists…a surge of "litigation industry" cancer cells—replacing healthy trial lawyer skill cells…, the vanishing civil jury trial…, a genetic mutation…that came to be known as "ADR";…[and] the inability of courts to implement reforms that would have reduced the enormous cost of getting cases to trial and enabled ATL to go off life support….[8]

at a glance

The popular image of the trial lawyer is disappearing fast.

Less than two percent of civil cases will ever be tried to a jury.

Trials have been replaced by tactics.

Judge Bennett's blistering obituary names ATL's surviving heir as "American Litigator (AL)," who is "the bastard child of ATL and ADR." The judge explains that "ALs do not try cases; ALs '*litigate*' them." ALs, he suggests, are defined by their lack of actual jury trial experience despite the fact that they "spew courtroom jargon to clients and opposing counsel as if they were real trial lawyers."[9] But ALs are frauds, the judge asserts, because

> [t]hey file motions…and bill endless hours for developing untested and unrealistic trial strategies…generating Everest-like mountains of paper. They are paper tigers. They never work alone, always traveling in packs. As trial dates approach, their relentless bravado evaporates into unlimited excuses to settle.[10]

Nor can any trial lawyer fail to notice that ALs prefer to travel in packs, such as those gathered together in the courtroom during a motion hearing. For example, one of my former partners recently attended oral argument before an 8th Circuit panel relative to the interim appeal of class certification in a large case—no fewer than eight lawyers sat at defense counsel's table and only one actually spoke!

Gamesmanship

In my own practice, I noticed all these things. Starting in the late 1990s, routine jurisdiction, venue, and discovery requests were constantly opposed and interlocutory appeals were filed that could consume a year or more. New technologies led to defense production of thousands of pages of useless information in response to discovery requests. These pages were located and selected not by lawyers but rather by IT specialists and computer algorithms. Today it is simply a fact: trials, like hurricanes, hardly ever happen.

Texas lawyer Stephen Susman says that experienced lawyers know that 90 percent of everything learned in discovery never makes it into court, which is another way of saying that 90 percent of what happens in discovery is not important to the case outcome. Today's litigators, he argues, "try to determine whether any particular [litigation] practice is beneficial to their side while being detrimental to the other side," which in turn rests on the assumption that "if the other side likes it, I don't," and vice versa.[11]

Small wonder that most civil cases are settled. Long before trial, the judge is sick to death of the endless motions and orders mediation—often more than once. In federal court, procedural and discovery issues are delegated to a magistrate judge for resolution; the resolution is then re-litigated. Judges are not at all ambiguous about their desire to see the case "go away." Lawyers ignore such desires at their peril.

The litigation cycle has come to be measured in years, not months; in my own experience, most federal and state "rocket docket" initiatives did not succeed. And not all judges are temperamentally or intellectually up to the challenge of presiding over the increasingly complex pretrial process. A 10-year lifespan is not unusual for a large case today. My firm has been central to a multidistrict FedEx driver status litigation that emerged intact in 2016 from a series of interim appeals originally started in 2003, but which is still in the final throes of adjudicating fee disputes between lawyers—disputes that threaten to increase this litigation's age beyond its current 14 years.

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So who and where are the real trial lawyers of today? Can we deny that Judge Bennett is spot on? We American litigators are increasingly dividing ourselves into ever-narrower specializations. Entire firms specialize and subspecialize in malpractice, environmental, land use, automobile, product liability, or corporate malfeasance cases. The trend reminds me of the modern definition of a specialist: someone who knows more and more about less and less until (s)he knows almost everything there is to know about almost nothing at all!

Is it unfair to characterize modern litigation as an expensive form of gamesmanship? The game, of course, consists of jurisdiction and venue challenges, Rule 11 and 12 motions, serial discovery requests/responses, serial motions, appeals of interim rulings, and more. Tactics have essentially replaced trials as the modern method of resolving major disputes.

Lawyers and judges are by no means solely responsible for the demise of the civil jury trial. Lawmakers play a major role in this loss—and for obvious reasons. After protracted legislative battles ultimately won by business/defense interests, many types of cases, including all securities cases, now face arbitration and are almost never the subject of a jury trial.[12]

Nor do courts deplore or resist the (now) almost universal use of arbitration clauses and "no-class-action" clauses in consumer contracts, which were the subject of an exhaustive three-part study by *The New York Times* in November 2015.[13] These clauses are now going to be found in greater and greater numbers in employment contracts as well, following a recent Supreme Court ruling.[14]

Conclusion

I feel lucky to have been in active practice and representing plaintiffs at a time when jury trials were still a reasonably regular feature of the trial practice. Like most older lawyers, I grew up with a romanticized view of the history, value, and efficacy of the American jury system in which citizens played a major part in resolving disputes of all kinds. The role models (fictional or otherwise) that we all conjured as we thought about venturing into the legal profession have pretty much disappeared.

Nothing on the horizon suggests that jury trials—particularly on the civil side—will return anytime soon. The trend is exactly the opposite. ■

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ENDNOTES

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